Commission required divestiture only where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.[50] The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.[51]

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,333 licensed commercial television stations in the United States,[52] Paxson owns only 61, less than 5% of the total number of commercial stations. Notwithstanding this relatively small percentage, Paxson's stations represent an important network programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a

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granted, Memorandum Opinion and Order, 53 FCC 2d 589 (1975), *modified*, *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

[50] *1975 Second R & O*, 50 FCC 2d at 1081-82.

[51] *Id.* at 1054.

[52] See Broadcast Station Totals as of September 30, 2002, *Press Release* (rel. November 6, 2002).

whole. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[53]

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[54] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties. The Supreme Court has recognized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"[55] The Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[56]

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements: (1) whether the case is one of first

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[53] *See* 5 U.S.C. § 551(4)(1994) (emphasis added).

[54] *See, e.g., American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980).

[55] *Heckler v. Matthews*, 465 U.S. 728, 746 (1984) (citation omitted).

[56] *Cf.* Amendments of Parts 20 and 24 of the Commission's Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7887 (1996); CATV of Rockford, Inc., *Memorandum Opinion and Order*, 38 FCC 2d 10, 15 (1972) *recon. denied*, 40 FCC 2d 493 (1973).

impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.[57] Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it has adopted new ownership restrictions.[58] A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice. As described above, the Commission would bear a heavy

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[57] *See, e.g., Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 11 FCC Rcd 2461, 2464 & n.42 (1995).

[58] See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, *First Report and Order,* 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); *1975 Second R & O*, 50 FCC 2d at 1074 (grandfathering broadcast-newspaper cross-ownership); Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, *Memorandum Opinion and Order*, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), aff'd, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *First Report and Order*, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions).

burden to justify deviation from such a venerable practice under the Supreme Court's *State Farm* decision and its progeny.[59]

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation.[60] Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of Paxson's UHF stations were weaker or newly-constructed when Paxson acquired them. The likelihood is that these stations would be economically devastated if divestiture were required. Under separate ownership, these stations would not have the same access to low-cost, competitive, diverse programming or significant financial resources, both of which are critical for the more vulnerable UHF stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

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[59] *See supra*, n. 44.

[60] *See, e.g., Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests, it also would disserve the public interest in enhanced television service.

C. Local Television Ownership Rule

The rule prohibiting local ownership of multiple television stations was originally enacted in 1964, and now is 38 years old.[61] The rule was liberalized in 1999 to allow ownership where both stations are not in the top four stations in the market and where eight independently owned broadcast stations remain following the duopoly combination (the "top four ranked/eight voices test").[62] The D.C. Circuit remanded this rule to the Commission because the Commission failed to justify the exclusion of other media from its top four ranked/eight voices test.[63] On remand the Commission should eliminate all restrictions on duopoly ownership and leave review of proposed duopolies to case-by-case Commission review and to the Department of Justice's anti-trust division.

1. <u>The Commission Should Eliminate All Restrictions on Duopoly Ownership</u>.

Although the *Sinclair* court did not strike down the duopoly rule as contrary to the public interest, the Commission now should recognize that current restrictions on duopoly ownership should be eliminated because they are not necessary as required by Section 202(h). Given the great diversity of voices available in every market through

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[61] *Ownership NPRM*, ¶¶ 73-74.

[62] *Ownership NPRM*, ¶ 74.

[63] *Sinclair*, 284 F.3d at 165.

DBS, cable, newspapers, radio, television, and the Internet, the top four ranked/eight voice test is a superfluous safeguard against excessive media concentration in local markets.

The Commission's proposal to remedy this deficiency by developing a new, more comprehensive test of media diversity in local markets is a good example of the cart trying to drive the horse. The market and public demand has produced this diversity of media voices, and there is no reason the Commission should find it necessary to preserve it through *post hoc* regulations. There is no incentive for large station group owners to descend upon communities and extinguish the diversity that currently exists and no evidence that they have the ability or intention to do so. Consequently, a prophylactic rule designed to counter that result cannot be justified as necessary in the public interest.

When the Commission takes a comprehensive view of local media markets, it must find that the top four ranked stations part of its duopoly rules must be eliminated. This test was never well conceived because it doesn't actually promote or preserve diversity, but rather acts as a *de facto* cap on any station group owner's local household reach akin to the national ownership reach cap discussed above. Accordingly, this part of the rule cannot be justified even under the *Sinclair* court's blessing of the duopoly rule's function in preserving diversity.[64] A combination of the top two stations in a market will not lead to any fewer media voices in a market than a combination of the first and fifth ranked stations in that market. Moreover, it is far from clear that the top

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[64] *See Sinclair*, 284 F.3d at 160.

four ranked test is necessary to protect competition for advertising dollars in local television markets. So long as multiple network-affiliated stations exist in a market, it is unlikely that a group owner even of the top two stations in a market would be capable of exercising market power in a local television advertising market. Accordingly, the top four raked stations test cannot be shown to further the public interest, let alone to be necessary to do so.

Similarly, the eight voices test is flawed and should be eliminated. A comprehensive view of the available local media voices shows that regardless of the duopoly rules, a significant number of media voices will be available. The Commission developed the eight voices test to balance the benefits of duopoly ownership versus the loss of diversity thereby caused.[65] When the Commission views the diversity of voices available in every local media market, however, it must make a more compelling justification for denying the benefits of duopoly ownership to Americans unfortunate enough to live in small DMAs. Indeed, people in the smaller DMAs would likely benefit more from the increase in programming quality offered by duopolized stations.

Competition in local markets will be adequately safeguarded by case-by-case Commission and Department of Justice review of proposed station combinations that involve top four stations or markets that will be left with fewer than eight independently owned television stations following the duopoly combination. The Commission will not be required to approve transactions that create duopolies that would transgress the current rule, and would be free to intervene if a particular transaction appeared to

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[65] *Duopoly Order*, 14 FCC Rcd at 12910-11.

threaten local diversity or competition. Given the ability of two federal agencies to control excessive consolidation on a case-by-case basis, the Commission cannot show that a prophylactic rule like the top four ranked/eight voices test is necessary in the public interest.

Instead, the Commission should allow unrestricted duopoly ownership regardless of station ranking or market size. As the Commission gains experience with unrestricted duopolies, the Commission may find it necessary to develop a test akin to its "50/70" screening rule it uses in the local radio context.[66] Conversely, if, after five years of unrestricted duopoly ownership, the market continues to produce current levels of diversity and competition, the Commission should begin exploring whether triopolies should be permitted.

2. Alternatively, NAB's "10/10 Rule" Would Provide Needed Relief to Small and Mid-Size Market Broadcasters.

If the Commission believes that an immediate transition to unrestricted duopoly ownership is imprudent, NAB's proposed "10/10 Rule" would be a reasonable transitional rule.[67] As Paxson understands it, the "10/10 Rule" would replace the eight-voices test with a presumption that any common ownership of multiple local stations would be acceptable – regardless of the number of voices in the market – if it involved two stations with audience shares of less than 10 or if it involved one station with a share of more than 10 and a second station with a share of 10 or less. Additionally,

[66] *See, e.g.*, Great Empire Broadcasting, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 11145, 11149 (1999) (*"Great Empire Broadcasting"*).

[67] *See* Comments of the National Association of Broadcasters, MB Docket Nos. 01-235, 02-277; MM Docket Nos. 02-244, 01-317, filed January 2, 2003.

station combinations that fail to meet this standard still would be entitled to case-by-case consideration of non-conforming applications, such as proposed triopolies.

If the Commission determines that its diversity goals require retention of some form of duopoly rule, NAB's proposal has much to recommend it. If the Commission chooses to follow this approach, it should carefully spell out what types of non-"10/10" arrangements will be most likely to receive favorable treatment. NAB suggests that the Commission retain its current preferences regarding duopoly waivers involving failed, failing, and unbuilt stations, and suggests that financial hardship associated with the DTV transition and the maintenance of local news operations should also be the basis for a waiver. Paxson agrees. The Commission should use the tools it has available to promote viable and robust stations at the local level, a swift DTV transition, and diverse programming serving local needs. To the extent that exceptions to any remaining duopoly rules serve these goals, the Commission should make those exceptions.

Short of elimination of the local television ownership restrictions, NAB's proposed "10/10 Rule," coupled with the reasonable waiver standard just described, would create the best set of probable outcomes. Although it may be preferable to the Commission's diversity goals to have the maximum number of different owners in each market, two separately-owned weak stations incapable of properly serving their communities' needs should be replaced, where possible by commonly owned duopolies. This result will maximize the benefits of local broadcasting, particularly to small and mid-sized communities, without compromising the Commission's policy goals.

D. The Newspaper Broadcast Cross-Ownership Rule Should Be Completely Repealed

Complete repeal of the newspaper/broadcast cross-ownership rule is long overdue. The Commission requested additional comment on this rule to the extent that comment on the other rules under review in this proceeding require it.[68] The only additional comment necessary, however, is that the Commission should delay no longer the repeal of this outmoded rule. The Commission already is in possession of a voluminous and detailed record that provides ample evidence that the newspaper/broadcast cross-ownership rule is contrary to the public interest, and accordingly, should dispose of the rule with due haste.

In brief, the record in Docket No. 01-235 reveals no evidence sufficient to enable the newspaper/broadcast cross-ownership rule to withstand scrutiny under Section 202(h). The newspaper/broadcast cross ownership rule clearly is not "necessary" in the public interest. All available evidence from markets containing grandfathered combinations indicates that the public is being richly served by a diverse and competitive array of local and national media voices. Indeed, all the relevant evidence suggests that this rule could not even satisfy a less rigorous standard than that laid out by Section 202(h), because it does not appear that the rule remains even arguably in the public interest.

The Commission adopted the newspaper/broadcast cross-ownership rule nearly twenty-eight years ago, frankly admitting that the rule was not designed to combat any particularized threat to the public interest, but rather to maximize diversity of local media

[68] *Ownership NPRM*, ¶ 7.

markets.[69] The Communications Act, however, no longer allows the Commission to override the benefits of free competition in the service of speculative goals that do not remedy any harm to the public interest. Moreover, the development of the newspaper and local broadcast industries has revealed that ownership restraints are more likely to impair than to increase diversity in local service.

As with its other broadcast ownership rules, it is time for the Commission to loose the chains of competition and allow the benefits to flow. Equally important, elimination of the blanket cross-ownership ban need not result in abdication of the Commission's oversight role over local media combinations. Instead, elimination of the ban will result only in a return to the *status quo ante* that proceeded the current rule. Both the Commission and the DOJ will be free to examine individual newspaper/broadcast combinations to ensure that local diversity and competition remain robust. Although this result may lead to a slightly greater expenditure of resources over time, it is the only approach supported by the record evidence in this proceeding.

E. Radio-Television Cross-Ownership Rule

The original radio/television cross ownership rule, which prohibited ownership of television and radio stations with overlapping service contours, now is thirty-two years old.[70] In 1999, however, the Commission relaxed this rule to permit common ownership of at least one radio and one television station in each market, with additional television

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[69] *1975 Second R&O*, 50 FCC 2d at 1048-49, 1049-50, 1079-84 (1975).

[70] Amendment of Section 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *recon. granted in part*, 28 F.C.C.2d 662 (1971).

and radio station ownership permitted in larger markets.[71] Even this relaxed rule, however, cannot be adjudged necessary in the public interest and must be liberalized.

As with the national television ownership cap and the duopoly rule, the current radio/television ownership rule involves the Commission in the worst sort of speculative market engineering. The rule is based on the proposition that the market will not demand viewpoint or content diversity or localism and that the Commission must ensure achievement of these goals through prophylactic ownership regulations that ensure a certain number of separate media owners in each market. As described above, this proposition is both logically flawed and contradicted by the evidence already in this proceeding. The market will demand localism and it is just good business to provide it.[72] Moreover, mid-sized and large multi-media market participants will be more likely to have the resources and risk capital necessary to provide diverse programming to niche markets than will smaller operators.

In addition, there is no special characteristic of the position of radio and television in local media markets that justifies special restrictions on ownership of both. The duopoly rules already control excessive concentration in broadcast television ownership and the local radio ownership rules already protect against that harm in the radio context. Obviously, any radio television combination that violates either of these rules should be forbidden. Beyond that, however, the Commission bears the heavy burden of satisfying Section 202(h)'s "necessity" standard in justifying further restrictions.

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[71] *Ownership NPRM*, ¶ 99.¶

[72] *See e.g.* Hearing of the Senate Commerce, Science, and transportation Committee Regarding Media Concentration, July 17, 2001 (testimony of Mel Karmazin).

With this in mind, the Commission can concentrate on adjusting its radio/television cross-ownership rule to safeguard only the most egregious cases of market concentration that will not be prohibited by the Commission's other ownership rules. The simplest approach to this potential harm is to utilize a modified version of the 50% screening mechanism the Commission uses to flag radio transactions that may create excessive concentration.[73] Under this arrangement, transactions involving the creation of a radio/television combination that would control 50% or more of the combined television and radio advertising revenue in given DMA would be subject to heightened scrutiny.

In the case of radio/television combinations, the DMA is the appropriate market in which to gauge concentration of advertising revenue because it dovetails with the geographic scope of the duopoly rules. Although many, if not most, radio stations will not place a service-grade contour over the entirety of the DMA in which it is located, television/radio combinations are likely to be constructed to cover as much of a DMA as possible to take maximum advantage of the efficiencies created by the overlapping service areas of the radio and television stations.

This screening approach will eliminate the potentially arbitrary results that application of the current rules could create. By using a revenue basis to trigger increased scrutiny rather than a station number or independent voice test, the Commission will get to the heart of any given television/radio combination's potential

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[73] *See, e.g.,* The Application of Voice in the Wilderness Broadcasting, Inc., *Hearing Designation Order*, MB Docket No. 02-272, FCC 02-246 (rel. September 05, 2002); *Great Empire Broadcasting* 14 FCC Rcd at 11148. *See also* Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

market power in the broadcast advertising market. Moreover, the Commission already has experience in assessing the likelihood of competitive harm that a combination controlling 50% or more of a market's advertising revenue could cause through its application of the screening mechanism in the radio context.

CONCLUSION

Paxson commends the Commission on its efforts to undertake a comprehensive review of its rapidly aging broadcast ownership rules. Paxson also understands the Commission's desire to "think outside the box" to achieve unified and consistent broadcast ownership rules. In this case, however, all that is necessary to satisfy Congress's goals and 202(h) of the Communications Act is the adjustments to the rules suggested herein. An immediate increase in the national ownership cap followed by a slow phase-out of the rule will allow the Commission to comply with the D.C. Circuit's orders while maintaining a contingency if excessive concentration begins to damage the public interest. Retention of the UHF discount will allow the Commission to continue to foster the birth of competitive television broadcast networks while taking due note of the physical limitations of UHF signals and the economic challenges those limitations create. Liberalization of the duopoly rules is the logical next deregulatory step given the lack of any negative market effects created by the current rules. Finally, elimination of the television/newspaper and television/radio cross ownership rules will remove arbitrary ownership limitations that do little other than prohibit broadcasters from realizing the economies inherent in multi-media operations while depriving the public of the improved programming product that those efficiencies would make possible. Each of these changes would have the effect of placing market forces and competition, rather than government regulation, in its proper place as the prime regulator of local media. Section 202(h) of the Communications Act and the public interest demand no less.

Respectfully Submitted,

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